IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE

CIVIL APPLICATION NO.4526 OF 2004
IN
FIRST APPEAL NO.266 OF 1987
IN
SPECIAL CIVIL SUIT NO.6405 OF 1975

Lockwod Industries & Transport Services ... Applicants

V/s.

M/s.Victoria Timber Supplying Company ... Respondent

Mr.Chirag Balsara i/b M/s.Negandhi Shah & Himayatullah for Applicants

Mr.D.S. Sawant for Respondent

CORAM: **SMT.NISHITA MHATRE, J.**

DATED: **MARCH 3, 2005**

P.C.:

. This is an application filed by the Respondent for recalling my judgement dated 23.12.2004 since the appeal was decided ex-parte. Mr.Balsara, learned Advocate appearing for the Applicants, submits that the applicants' advocate was not able to remain present in Court when the First Appeal was listed for hearing due to the lapse on the part of Court clerk of the Advocate for the Applicants. The Court clerk has filed an affidavit which states that the matter was due on 21.10.2004. However, it was not listed on the Board on that date. He further states in para 5 that due to oversight on his part he failed to check the Board on

27.10.2004. Mr.Balsara submits that due to the fault of either the Court clerk or the advocate for the applicants, the applicants should not be made to suffer. He presses into service the judgments of the Supreme Court in *Rafiq & Anr. v/s. Munshilal & anr.,* **AIR 1981 SC 1400;** *Lachi Tewari Ors. v/s. Director of Land Records & Ors.*, **AIR 1984 SC 41** and *Savithri Amma Seethamma v/s. Aratha Karthy & Ors.*, **AIR 1983 SC 318**.

2. Mr.Sawant, appearing for the Respondent, vehemently opposes recalling of the judgement. He submits that the matter was listed on the Board on 27.10.2004 and reached on 28.10.2004 for hearing. The judgment was reserved on that date and was pronounced on 23.12.2004. According to the learned Advocate, the applicants or their advocates should have taken steps to ascertain as to what had happened in the appeal when it was not listed after 21.10.2004 which according to the applicants was the due date.

3. There is no doubt in my mind that the advocates of the applicants and the staff have been most negligent in ensuring that their clients are heard in the appeal when the matter was listed on the Board. However, a litigant should not be penalised and made to suffer the consequences of an ex-parte decision for the fault of the advocate. In this view of the matter, I am inclined

to recall the order subject to payment of costs of Rs.10,000/- by the applicants to the Respondent.

4. Civil Application is disposed of accordingly.

5. Appeal to be listed for hearing in the appropriate Court upon payment of costs as aforesaid.